# Appendix.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 29600.

ROBERT JONES

*v.*

NEDERLANDSCHE AMERIKKANSH STOOMVAART MAATSCHAPPIJ, N. V.

*v.*

PHILADELPHIA CEILING & STEVEDORING CO.

## OPINION.

May 12, 1965.

LUONGO, *J.*

While unloading peat moss from defendant's vessel, Robert Jones, a longshoreman, stepped into a bilge box from which the lid was missing and was injured. He sued defendant ship-operator, alleging that his injury was caused by an unseaworthy condition and by defendant's negligence in failing to provide him with a safe place to work. Defendant brought in the stevedore as a third-party defendant, seeking indemnification for breach of the warranty to perform the cargo discharging operation in a proper and workmanlike manner.

At the conclusion of Jones' case, defendant conceded liability for the unseaworthy condition resulting from the displaced bilge box lid and the jury awarded damages to Jones in the amount of $45,000. Judgment on that verdict has been satisfied. In the third-party proceeding, the jury returned a verdict in favor of the third-party defendant. It is that verdict which the defendant ship-operator has moved to set aside.

Defendant sought to establish the stevedore's improper performance on two grounds: (a) that the use of cargo hooks in the unloading of the bales of peat moss was improper and (2) that the stevedore permitted an unreasonable accumulation of loose peat moss on the floor of the tank where the longshoremen were working. It was defendant's position that the use of hooks on these bales created the loose peat moss and that the accumulation of loose peat moss in the working area was so great that it concealed the admittedly unseaworthy condition, preventing Jones from seeing and avoiding it, and preventing the stevedore from discovering and correcting it.

Defendant's complaint is that the court erred in submitting to the jury the question whether there was proper performance of the work by the stevedore. In that contention it relies upon the testimony of plaintiff Jones that there was an accumulation of 10 to 12 inches of loose peat moss in the working area, and the testimony of Coyle, third-party defendant's ship foreman, that assuming an accumulation of the degree testified to by Jones, proper performance of the work would have required removal of the loose peat moss before proceeding with the unloading operation. With such testimony in the case, defendant contends that there was nothing to submit to the jury on the performance issue and that the court should have declared as a matter of law that the work was improperly performed.

The testimony which defendant relies on was oral. The credibility of oral testimony, even if uncontradicted, is for the jury which is free to accept or reject it.

> "Such an approach towards uncontradicted evidence is firmly rooted in the policy of the law of evidence. As Wigmore has pointed out, '*the mere assertion of any witness* does not of itself need to be believed, *even though he is unimpeached* in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony.'" *Rhoades, Inc. v. United Air Lines, Inc.*, 340 F. 2d 481, 485 (3d Cir. 1965), quoting from 7 WIGMORE, EVIDENCE § 2034 (3d ed. 1940) (Italics in original.)

In this case, the testimony referred to was not uncontradicted. There was disagreement as to the degree of accumulation of loose peat moss. Jones testified that there was as much as 10 to 12 inches on the floor of the tank, whereas Aalbert Mulder, the vessel's Chief Officer, who was called as a witness by defendant, testified that when he went into the tank immediately after Jones sustained the injury, he felt around for the bilge box lid and estimated that there was approximately 2 to 3 inches of loose peat moss in the area of the bilge box. Moreover, although Coyle testified that an accumulation such as testified to by Jones would have required removal of the loose peat moss, considerable doubt was cast on whether in fact such an accumulation existed by Coyle's further testimony that if there had been such an accumulation the hatch foreman would have requested authorization to remove it, and no such request was made.

There was also a conflict in the testimony as it related to the use of cargo hooks on the bales of peat moss. There was some testimony in support of defendant's position that the use of cargo hooks was improper, and there was other testimony indicating that the use of cargo hooks was not only proper, it was essential to the discharge of such cargo.

In the face of such conflicting testimony, the court submitted to the jury for its determination: (a) what constituted proper performance of the work of unloading a

cargo of peat moss; (b) whether the third-party defendant had or had not performed in accordance with that standard; and (c) if the third-party defendant had failed so to perform, whether such failure was a substantial factor in causing Jones' injury. All these were matters peculiarly within the jury's province. The jury, on the evidence before it, could have concluded that the handling of the bales of peat moss necessarily caused a certain amount of loose peat moss, that proper performance of the work required removal only when the accumulation was excessive, and that the accumulation of loose peat moss here was within the limits of proper and workmanlike performance of the work.

These matters were properly for the jury and were so submitted under instructions to which no exception was taken. There is ample support for the jury's resolution of those issues in favor of the third-party defendant, and I am not free to substitute my view of the evidence for the jury's.

Defendant's motion to vacate and set aside the judgment in favor of the third-party defendant will be denied.

**ORDER.**

AND NOW, this 12th day of May, 1965, it is ORDERED that the motion of Nederlandsche Amerikkansch Stoomvaart Maatschappij, N. V., otherwise known as Holland-American Line, defendant and third-party plaintiff, to vacate and set aside the judgment in favor of Philadelphia Ceiling and Stevedoring Co., third-party defendant, be and it is hereby DENIED.

ALFRED L. LUONGO, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15469

ROBERT JONES

*v.*

N.V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ,
*Appellant*

*v.*

PHILADELPHIA CEILING AND STEVEDORING COMPANY,
*3d Party Defendant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 12, 1966

Before McLAUGHLIN, GANEY and FREEDMAN, *Circuit Judges.*

## OPINION OF THE COURT

(Filed October 13, 1966)

FREEDMAN, *Circuit Judge.*

A longshoreman brought suit against the owner of a vessel to recover damages for personal injuries caused by the unseaworthiness of the vessel. He was employed by the stevedore to discharge a cargo consisting of bales of

peat moss. As work progressed loose peat moss flaked off or was loosened by the longshoremen's hand hooks and accumulated in the hold of the vessel. Plaintiff claimed that he sustained his injury when he stepped into an open bilge box in the hold which was concealed by an accumulation of loose peat moss.

The owner of the vessel claimed that the stevedore, which it brought in as a third-party defendant, was liable over to it for breach of the warranty of workmanlike service. It asserted that the cover of the bilge box had been removed by representatives of the stevedore and that it was they who had created the unseaworthy condition. At the conclusion of the longshoreman's case, however, the shipowner conceded its liability. The jury ultimately returned a directed verdict in favor of the longshoreman against the shipowner in the amount of $45,000, but found in favor of the third-party defendant. It is from the judgment against it as third-party plaintiff that the shipowner has taken this appeal. We shall for convenience refer to the shipowner as the plaintiff and to the stevedore as the defendant.

The verdict of the jury establishes that in its view the work conducted by the stevedore had not gone forward in an unsafe or unworkmanlike manner even though peat moss had been permitted to accumulate. It is true that such an accumulation, however slight, when sufficient to cover the surface of the hold, might obscure dangers, but none of the witnesses testified that this would constitute an unsafe or workmanlike practice. There are some risks which are inherent in the nature of the activity.

Plaintiff's claim is more directly focused on the assertion that its expert testified that the only safe and proper method of stevedoring was to remove the scattered peat moss by shoveling it into a net covered with burlap or canvas and then having it dumped or removed. It concedes that if there had been any evidence to controvert such an expert opinion it would have created a factual

issue for the jury. The argument falls under the weight of the concession. For the opinion of an expert even if uncontradicted is not conclusive and a jury is not required to accept it. Such testimony must pass through the screen of the jury's judgment of credibility. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944); *Rhoades, Incorporated v. United Air Lines, Inc.*, 340 F. 2d 481 (3 Cir. 1965); *Wooley v. Great Atlantic & Pacific Tea Company*, 281 F. 2d 78 (3 Cir. 1960).

Moreover, the testimony of plaintiff's expert would not justify a finding that any accumulation of loose peat moss would have constituted an unsafe or improper stevedoring practice. Originally he was asked to assume that as the operation progressed peat moss had accumulated to perhaps 6 inches and in some places even deeper, and that at one time an accumulation had been shoveled into a pile which reached as high as the courtroom doorway. This, he said, would not be a proper or safe stevedoring practice. On cross-examination he was asked how much of an accumulation of loose peat moss would make the use of a net necessary. He answered, "a couple of inches". It is clear, therefore, that the testimony of plaintiff's expert would not condemn as unsafe practice the smallest accumulation of loose peat moss but only one where at least a couple of inches had been permitted to accumulate without being moved. Even if this were accepted by the jury as the standard of a safe and proper practice it would not inevitably follow that the defendant was shown to have breached its warranty. For replete in the testimony of every witness is the characterization of the circumstances which shows that the accumulation varied. Thus, the chief officer of the vessel testified there was about a foot of accumulated peat moss under the coaming but that it was not of a uniform depth throughout the hold. When he found the cover immediately after the accident it was below an accumulation of only 2 or 3 inches of peat moss. The evidence of a number of witnesses, including the original

plaintiff, shows that the peat moss was shoveled away and the jury may well have believed that this was adequate while the work was in progress.

The case therefore is not susceptible of reduction to a mathematical equation in which it may be said that the maximum allowable accumulation was conclusively shown and the witnesses on both sides agreed that the actual accumulation exceeded this amount. It is rather one in which the jury was not required to accept the expert's opinion and where, moreover, even if it had done so it could not be said to have disregarded all of the evidence in concluding that the standard was not violated.

The factual variations in the evidence, the testimony of the defendant's foreman that those working at the job did not consider the accumulation sufficiently great to require removal, all made the question of the adequacy of the stevedore's performance of its work a matter which was peculiarly for the jury to determine.

The judgment of the court below therefore will be affirmed.

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McLaughlin, *Circuit Judge,* dissenting.

In this unnecessarily complicated case, the trial judge, on the mistaken idea that there was contradictory factual evidence regarding the stevedore's negligence respecting the accumulation of peat moss on the floor of the tank, submitted that issue to the jury. The court did accurately confine the negligence problem to the peat moss accumulation. The removal of the cover itself over the hole in the hold does not enter into the situation before it. It was the concealment of the hole by the loose peat moss which prevented the plaintiff Jones from seeing it and caused him to inadvertently step into the hole and to fall.

Jones was the sole witness who testified about the state of the tank before he fell. He said that "* * * on

the floor itself there was about a foot of peat moss, * * * in some places there were more, of loose peat moss, and we—*and I didn't see the floor at all.*" *Asked "Was it possible to see the floor?" Jones replied, "No, sir, it wasn't."* (Emphasis supplied). Describing the accident he said that "I was going back to get the last one (bale), when my leg disappeared in the peat moss, and as my left leg went in, my right leg went out from under me, and I, of course, had lost my complete balance." The trial judge misunderstood the evidence of the ship's Chief Officer Mulder who inspected the tank immediately after Jones' fall. The Chief Officer said that in the center of the tank where the opening was, the depth of the peat moss, *"I would say was about a foot."* (Emphasis supplied). By groping around he found the cover and *asked how much peat moss was on the top of it,* he answered, "Two or three inches." It was this latter figure that the judge mistakenly noted as testimony from Mulder "that there was approximately 2 to 3 inches of loose peat moss in the area of the bilge box."

An expert stevedore testified that it was not proper, safe stevedoring practice to allow loose peat moss to accumulate as had been testified to (and not denied), during discharge of such cargo. The stevedore-foreman on this particular unloading, testifying on behalf of the Philadelphia Company, stated that "We move peat moss if it gets too deep * * *." His method of removal was substantially that of the above mentioned expert.

It seems to me that soundly and fairly all of the fact evidence in this trial pointed to the glaring proximate fault of the stevedore company in the discharge of the peat moss cargo. That result cannot be impugned by the attempted brushing aside of the expert's testimony as opinion evidence. The hard fact that plaintiff was hurt through the inexcusable carelessness of the stevedore was not dependent on acceptance or rejection of the clearly right judgment of the expert. He merely rounded out the entirely, undis-

puted factual showing of just what had caused plaintiff's fall. His testimony was at most collaterial to the dispositive proof of the stevedore's responsibility for the accident. On countless occasions negligence questions are, as they should be, referred to a jury but there are trials, of which this appeal is a prime example, where the evidence demands affirmative action from the court as a matter of law.

I would reverse the judgment of the district court.

## OPINION OF THE COURT OF APPEALS ON REHEARING

(Filed December 28, 1966)

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Reargued December 20, 1966

Before STALEY, *Chief Judge*, MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH, FREEDMAN and SEITZ, *Circuit Judges*

PER CURIAM:

The judges who heard the appeal on reargument being equally divided, the judgment of the district court will be affirmed.

## JUDGMENT ON REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ORDERED and ADJUDGED by this Court that the judgment of the said District Court, filed December 7, 1964, be, and the same is hereby affirmed with costs.